IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 20, 2004 Session

STATE OF TENNESSEE v. CHESTER WAYNE WALTERS

Appeal from the Criminal Court for White County
No. CR599 Lillie Ann Sells, Judge

No. M2003-03019-CCA-R3-CD - Filed November 30, 2004

A White County Criminal Court jury convicted the defendant, Chester Wayne Walters, of two counts of rape of a child, a Class A felony, and two counts of aggravated sexual battery, a Class B felony, and the trial court sentenced him to concurrent sentences of twenty-five years for each rape conviction and twelve years for each aggravated sexual battery conviction. The defendant appeals, claiming that (1) the evidence is insufficient to support the convictions; (2) the trial court should have merged the aggravated sexual battery convictions into the child rape convictions; (3) the trial court improperly allowed an expert to give hearsay testimony; (4) the trial court erred by failing to charge any lesser included offenses; (5) the trial court gave erroneous jury instructions on the mens rea elements of the crimes; and (6) his sentences are excessive. We affirm the defendant's child rape convictions but hold that his convictions for aggravated sexual battery violate double jeopardy and must be merged into the child rape convictions. We also hold that the trial court improperly enhanced the defendant's sentences in light of Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531 (2004), and we reduce the defendant's sentences to twenty-three years for each child rape conviction. We remand the case for the entry of appropriate judgments of conviction.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part, Modified in Part, Case Remanded

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., concurred.

David Neal Brady, District Public Defender, Joe L. Finley, Jr., and John Byers Nisbett, III, Assistant Public Defenders, for the appellant, Chester Wayne Walters.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; William Edward Gibson, District Attorney General; and William M. Locke, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the defendant's having sexual intercourse with his girlfriend's twelve-year-old daughter. The victim testified that in 1997, she lived in a trailer with her mother, older brother, younger sister, and the defendant. She said that on February 10, 1997, she did not go to school because it was her twelfth birthday and that she was at home alone with the defendant. She said that she went into the bathroom about 4:00 p.m. to take a shower and that she got undressed. She said that the defendant came in the bathroom, got "ahold" of her, and that they ended up on the floor. She said that the defendant was touching her breasts and genital area and that he put his private in her private and began moving back and forth. She said that it felt like "it was ripping my intestines out," that the defendant ejaculated on her, and that she bled afterward. She said that the defendant told her it would feel better if she would be quiet and wait and that she "would want it more often." She said he also threatened to hurt his young son if she told anyone. She said she took a shower and did not tell her mother about the incident because her mother was in love with the defendant and because she was afraid her mother would hate her.

The victim testified that on Friday, September 12, 1997, her mother, brother, and sister went to the store and that she was at home alone with the defendant. She said that she was sitting on the living room couch and that the defendant walked over to her and began kissing her and taking off her clothes. She said that the defendant rubbed her private parts and had sexual intercourse with her, that he ejaculated, and that she bled. She said that right after the incident, her father's car pulled up to the trailer and her father blew the horn. She said the defendant went to the door in his underwear and told her father that everyone had gone to the store. She said that her father left and that she did not tell her mother about the incident when her mother got home. She said that she went to live with her father in order to get away from the defendant and that her father got custody of her and her brother. She said that in September 1999, the Department of Human Services (DHS) began investigating her relationship with Aaron Trobaugh, a jail inmate. She said that she and Mr. Trobaugh were friends and had been exchanging letters. She said Tonya Scott from the DHS questioned her about the letters and began pressuring her. She said she became upset and told her stepmother and stepsister about having sex with the defendant. She said that she later told Ms. Scott about the abuse and that a doctor examined her. She said that she was telling the truth and that she had no reason to lie against the defendant.

On cross-examination, the victim testified that Mr. Trobaugh had known her mother for a long time, that he and her mother had grown up together, and that Ms. Scott questioned her about whether she had had sex with him. She said that she had never had sex with Mr. Trobaugh, that she loved him in a friendly way because he had done a lot for her family, and that they had exchanged friendship letters. She denied that they discussed marriage and sex in their letters but acknowledged that she told Ms. Scott she had kissed Mr. Trobaugh on the cheek. She said that she did not remember telling Ms. Scott she had kissed Mr. Trobaugh on the lips and that she had no reason to protect him.

Arthur Young, the victim's father, testified that after he divorced the victim's mother, the victim's mother had custody of the victim and her brother for about ten years. He said that he remarried, visited the children every weekend, and would pick them up on Friday afternoons. He

said that in 1997, the victim and her brother were living in a trailer with their mother and the defendant and that on September 12, he went to the trailer to pick up the children for the weekend. He said that he blew the horn and that the defendant came to the door wearing only his underwear. He said that he asked the defendant where the victim's mother was and that the defendant told him everyone was at the store. He said that he went to the store and that his son told him the victim was at the trailer. He said that when the victim's mother came outside, he fussed at her for leaving the victim alone with the defendant. He said the victim's mother got upset and told him that the defendant would not hurt the victim. He said that he drove into town to speak with an attorney, that he filed for custody of his children immediately, and that a temporary custody hearing was held on September 15.

On cross-examination, Mr. Young testified that seeing the defendant in his underwear and learning that the victim was alone with the defendant concerned him very much. He said, though, that he did not go back to the trailer to get the victim because his ex-wife was upset and "would have stirred up all kinds of trouble." He said that after he got custody of his children, he did not ask the victim if anything was going on with the defendant and she did not tell him about the abuse. He acknowledged that in 1999, he confiscated romantic letters that the victim and Aaron Trobaugh had exchanged. He said that as soon as he learned about their relationship, he put a stop to it. He said that in September 1999, the DHS began investigating the victim's relationship with Mr. Trobaugh and that someone from the DHS interviewed the victim at school without his permission. He said that at first, the victim did not tell anyone from the DHS about the defendant's sexual abuse. He said the victim later told his wife and Tonya Scott about it.

Dr. Allen Drake testified that he examined the victim on October 4, 1999, for possible sexual abuse. He said that the victim had a difficult time telling him about the abuse because she was embarrassed and that he obtained most of his information from the victim's stepmother. He said that according to the victim's stepmother, the victim had stated that the defendant forced the victim to have sex with him on several occasions when the victim was eleven or twelve years old. He said that he asked the victim if her stepmother's information was correct and that the victim said yes. He said that the victim's hymen had been broken but had completely healed and that he found no evidence of trauma, bleeding, or abrasions to the victim's external genitalia. He said that his examination of the victim was consistent with the stepmother's information and that the healed hymen indicated the abuse had occurred at least three weeks before he examined the victim. He acknowledged that something other than a penis could have penetrated the victim.

I. SUFFICIENCY OF THE EVIDENCE

The defendant claims that the evidence is insufficient to support the convictions because the two incidents happened seven months apart, the victim waited until 1999 to tell anyone, and the victim's father went to see a lawyer instead of returning to the trailer to get the victim. The state contends that the evidence is sufficient. We agree with the state.

Our standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). We do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions about witness credibility were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

The victim testified that the defendant came into the bathroom on February 10, 1997, her twelfth birthday, touched her breasts and genital area, and put his penis in her vagina. She testified that on September 12, 1997, the defendant again touched her private parts and had sexual intercourse with her. The victim also testified that her father arrived soon after, that the defendant went to the door wearing only his underwear, and that the defendant told her father that the victim was at the store with her mother. The victim's father corroborated the victim's testimony that the defendant came to the door in his underwear and lied about the victim's whereabouts. Dr. Drake testified that the victim's hymen had been torn but had healed and that his examination of the victim was consistent with her account of the crimes. Although the defendant essentially argues that the victim's testimony was not credible, the credibility of a witness is a determination made by the jury, not by this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). We believe the evidence is sufficient to support the convictions.

II. MERGER

The defendant claims that the trial court should have merged his aggravated sexual battery convictions into his rape of a child convictions because the separate convictions arose from only one course of conduct in the bathroom and one course of conduct in the living room. In support of his argument, he cites State v. Anthony, 817 S.W.2d 299 (Tenn. 1991), in which our supreme court held that convictions for both kidnapping and robbery violated the defendant's due process rights when the detention resulting in the kidnapping conviction was essentially incidental to the commission of the accompanying felony. The state claims that the evidence supports separate convictions. We conclude that the defendant's aggravated sexual battery convictions must be merged into his child rape convictions.

The double jeopardy clauses of both the United States and Tennessee Constitutions state that no person shall be twice put in jeopardy of life or limb for the same offense. U.S. Const. amend. V; Tenn. Const. art. I, § 10. The clause has been interpreted to include the following protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076 (1969); State v. Denton, 938 S.W.2d 373, 378 (Tenn. 1996).

The supreme court has held that the "essentially incidental" test in Anthony is not useful in the context of sexual offenses because "each separate sexual act 'is capable of producing its own attendant fear, humiliation, pain, and damage to the victim.'" State v. Barney, 986 S.W.2d 545, 548 (Tenn. 1999) (quoting State v. Phillips, 924 S.W.2d 662, 665 (Tenn. 1996)). In Barney, the court stated that "if the act in question directly facilitates or is merely incidental to the accompanying sexual conduct (such as, for example, applying lubricant to the area of intended copulation), convictions for both acts would be barred. If, however, the act in question is 'preparatory' only in the sense that it is intended to sexually arouse either the victim or the perpetrator, separate convictions are not barred." Id. (citations omitted). The court stated that the following factors were relevant in determining whether "conduct is directly facilitative, and thus incidental, or merely preparatory in the sense of intending to arouse the victim or perpetrator":

> 1. temporal proximity--the greater the interval between the acts, the more likely the acts are separate;
>
> 2. spatial proximity--movement or re-positioning tends to suggest separate acts;
>
> 3. occurrence of an intervening event--an interruption tends to suggest separate acts;
>
> 4. sequence of the acts--serial penetration of different orifices as distinguished from repeated penetrations of the same orifice tends to suggest separate offenses; and
>
> 5. the defendant's intent as evidenced by conduct and statements.

Id. at 548-49.

Applying these factors to the February 10, 1997 incident, the first factor, temporal proximity, weighs against dual convictions because the defendant's touching the victim's breasts and genital area occurred only moments before the penile penetration. The second factor, spatial proximity, also weighs against separate convictions because the victim did not testify that the defendant moved or repositioned her before the rape. The third factor, whether there were intervening events, weighs against separate convictions because the acts occurred closely together without any interruption. The fourth factor, the sequence of the acts, supports dual convictions because the victim testified that the defendant first rubbed her breasts and genital area and then penetrated her. Finally, no evidence exists to show that the defendant formed the intent to penetrate the victim only after he touched her. Therefore, the defendant's separate convictions for the bathroom incident violate double jeopardy, and his aggravated sexual battery conviction must be merged into his rape of a child conviction.

The separate convictions for the September 12 incident also violate double jeopardy. Regarding the living room incident, the victim testified that the defendant kissed her, took off her

clothes, and began "[r]ubbing me, my private parts, and putting his private part in my private part and moving back and forth." In light of the Barney factors, this description of the events is insufficient to establish that the defendant's rubbing or touching the victim was not incidental to the rape. The second aggravated sexual battery conviction also must be merged into the second child rape conviction.

III. EXPERT TESTIMONY

The defendant claims that the trial court erred by allowing Dr. Drake to testify that according to the victim's stepmother, the victim stated that the defendant had sex with the victim "on several occasions." He contends that this testimony was hearsay and did not fall under Rule 803(4), Tenn. R. Evid., the exception to the hearsay rule that allows hearsay statements made for the purposes of medical diagnosis and treatment. He also contends that the testimony was not admissible under Rule 703, Tenn. R. Evid., for expert testimony because the defendant's penetrating the victim on several occasions was irrelevant to his opinion as to whether the defendant sexually abused the victim. The state contends that the testimony was proper under Rule 803(4). We conclude that the defendant has waived this issue.

Dr. Drake testified that the victim was brought to his office in order for him to "evaluate for possible sexual abuse." He said that he obtained the victim's history from her mother and acknowledged that the victim's history was necessary for his diagnosis and treatment of her. He then testified as follows:

> [Dr. Drake:] The mother advised me that [the victim] stated that on several occasions when she was around eleven or twelve years old that she had been forced to have intercourse with a person by the name of Chester Wayne Walters.
>
> I stated in my letter to the Department of Human Services that I was not absolutely sure of the last name, but that the person was identified as the mother's ex-boyfriend.
>
> The information came from the mother and I asked [the victim] whether that information was correct and she replied that it was.
>
> [Defense]: Your Honor, for the record, to the extent that that last testimony violates the Court's order, I object "on several occasions".

COURT: Well, the witness or the victim has testified here as to the occasions. So the doctor isn't testifying . . . he's just testifying about the history that he took from the mother. So the objection is overruled. If there's any kind of special charge requested, we can do that, but at this time I'm going to overrule the objection. Proceed with caution, general.

Dr. Drake then testified that he examined the victim, that her hymen had been broken but had healed, and that the results of his examination were consistent the victim's statements.

The trial transcript reflects that the defendant did not object to Dr. Drake's testimony on the basis that it was hearsay or that it violated any rule regarding expert testimony. By failing to state these grounds for his objection, the defendant denied the trial court the opportunity to rule on them. See T.R.A.P. 36(a). Moreover, this court has stated that a "party cannot assert a new or different theory to support the objection in the motion for a new trial or in the appellate court." State v. Adkisson, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994). Raising a new ground on appeal for objecting to the introduction of evidence results in a waiver of the issue on appeal. Id.

IV. LESSER INCLUDED OFFENSES

The defendant claims that the trial court erred by failing to charge any lesser included offenses. The state contends that the trial court's failure to charge lesser included offenses was harmless error. We agree with the state.

In criminal cases, the trial court has the duty to charge the jury on all of the law that applies to the facts of the case. See State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992). Anything short of a complete charge denies the defendant his constitutional right to a trial by jury. See State v. McAfee, 737 S.W.2d 304, 308 (Tenn. Crim. App. 1987). Our supreme court has held that an offense is a lesser included offense if:

> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
>
> > (1) a different mental state indicating a lesser kind of culpability; and/or
> >
> > (2) a less serious harm or risk of harm to the same person, property or public interest; or

(c) it consists of

> (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
>
> (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
>
> (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

State v. Burns, 6 S.W.3d 453, 466-67 (Tenn. 1999). If an offense is a lesser included offense, then the trial court must conduct the following two-step analysis in order to determine whether the lesser included offense instruction should be given:

> First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser-included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser-included offense.

Id. at 469.

If a trial court improperly omits a lesser included offense instruction, then constitutional harmless error analysis applies and this court must determine if, beyond a reasonable doubt, the error did not affect the outcome of the trial. State v. Ely, 48 S.W.3d 710, 725 (Tenn. 2001). "In making this determination, a reviewing court should conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury." State v. Allen, 69 S.W.3d 181, 191 (Tenn. 2002).

A. Rape of a Child

The defendant claims that the trial court erred by failing to charge attempted rape of a child, aggravated sexual battery, Class B misdemeanor assault, and child abuse as lesser included offenses of rape of a child. As pointed out in the defendant's brief, attempted rape of a child is a lesser included offense of rape of a child under Burns, part (c). See State v. Marcum, 109 S.W.3d 300, 302 (Tenn. 2003). Moreover, aggravated sexual battery when the victim is less than thirteen, child abuse,

and Class B misdemeanor assault also are lesser included offenses of rape of a child. See State v. Elkins, 83 S.W.3d 706, 711-12 (Tenn. 2002).

Regarding the trial court's failure to charge attempted rape of a child as a lesser included offense of rape of a child, a person commits attempt who, acting with the kind of culpability otherwise required for the offense,

> (1) Intentionally engages an action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

T.C.A. § 39-12-101(a). The statute also provides that it is "no defense to prosecution for criminal attempt that the offense attempted actually was committed." T.C.A. § 39-12-101(c).

In Allen, 69 S.W.3d at 188, our supreme court stated that "[a]s a general rule, evidence sufficient to warrant an instruction on the greater offense also will support an instruction on a lesser offense under part (a) of the Burns test." However, the supreme court said this general rule does not extend to offenses that are lesser included offenses under Burns, part (c). Id. In explaining this rationale, the court noted that "[f]or lesser offenses under part (c), proof of the greater offense will not necessarily prove the lesser offense." Id. Nevertheless, the trial court must give an instruction on the lesser offense unless "no reasonable mind could accept the existence of the offense." Id. at 189.

Despite Allen's stating that a lesser included offense instruction is required if warranted by the evidence, this holding conflicts with the supreme court's recent holding in Marcum, 109 S.W.3d at 304. In Marcum, the defendant was convicted of rape of a child for forcing the victim to put her mouth on his penis. The defendant claimed that the jury could have concluded that no penetration of the victim's mouth occurred, warranting an instruction on the lesser included offense of attempted child rape. The supreme court disagreed, noting that the definition of sexual penetration included fellatio and that fellatio did not require intrusion into the victim's mouth. Id. at 304. The court determined that given the victim's testimony that she performed fellatio on the defendant and that the defendant contended the incident never occurred, the testimony "was susceptible of only two interpretations-that the rape occurred or that it did not." Id. The supreme court held that an attempt

instruction was not required because there was only proof of the completed crime as opposed to an attempt. Id. Thus, even though the elements of an attempt under T.C.A. § 39-12-101 were necessarily proven, no instruction was needed.

Turning to the present case, we note that rape of a child requires unlawful sexual penetration. See T.C.A. § 39-13-522(a). The victim testified that the defendant penetrated her vagina twice with his penis, and Dr. Drake testified that the victim's hymen had been torn in the past, supporting the victim's claims. Although the defendant did not testify, his cross-examination of the victim and the victim's father demonstrated that he contended the bathroom and living room incidents never occurred and that the victim made up her claims in order to protect Aaron Trobaugh. Like Marcum, the testimony was susceptible of only two interpretations, either that the defendant raped the victim or that he did not. There is no evidence that the defendant only attempted to penetrate the victim, and the trial court was not required to instruct the jury on attempted child rape.

Regarding aggravated sexual battery when the victim is less than thirteen, child abuse, and Class B misdemeanor assault, those offenses also are lesser included offenses of rape of a child, but not under part (c) of Burns. Aggravated sexual battery as it relates to this case is unlawful sexual contact with a victim when the victim is less than thirteen. See T.C.A. § 39-13-504(a)(4). "Sexual contact" is "the intentional touching of the victim's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." T.C.A. § 39-13-501(6). Because aggravated sexual battery requires that the touching be reasonably construed as being for the purpose of sexual arousal or gratification, which is not an element of child rape, it is not a lesser included offense in this case under Burns, part (a). However, aggravated sexual battery is a lesser included offense under part (b)(1) of Burns because a defendant's "intent to touch a victim's intimate parts for the purpose of sexual arousal constitutes a mental state reflecting a lesser degree of culpability than the reckless, knowing, or intentional commission of sexual penetration for any reason." State v. Gary J. Greer, No. M1998-00789-CCA-R3-CD, Davidson County, slip op. at 13 (Tenn. Crim. App. Mar. 17, 2000), app. denied (Tenn. Sept. 24, 2001); see also Elkins, 83 S.W.3d at 711-12 (stating without analysis that aggravated sexual battery is a lesser included offense of child rape). Child abuse is, statutorily, a lesser included offense in this case. See T.C.A. § 39-15-504(d) (stating that child abuse may be a lesser included offense "of any kind of . . . sexual offense if the victim is a child and the evidence supports a charge"). Finally, Class B misdemeanor assault also is a lesser included offense of child rape under Burns. See Elkins, 83 S.W.3d at 711 (holding that Class B misdemeanor assault is a lesser included offense of aggravated sexual battery).

Having determined that aggravated sexual battery when the victim is less than thirteen, child abuse, and Class B misdemeanor assault are lesser included offenses of rape of a child, we must now determine whether the evidence warranted instructions on those offenses. We must admit, however, that we are unable to rationalize a difference between determining whether the evidence exists to warrant instructions for offenses that are lesser included offenses under part (a) of Burns, as in Allen, and whether the evidence exists to warrant instructions for offenses that are lesser included offenses

under part (c) of Burns, as in Marcum. Under the evidence in the present case, we could conclude that a reasonable mind could accept that the elements of an attempt to rape existed, which, under Allen would lead to instructions on the crime of attempt. On the other hand, if the evidence does not warrant instruction for attempted rape of a child pursuant to Marcum's rationale, then under the facts of a case like this one, when the only issue is sexual penetration and the defendant contends that no sexual activity of any kind occurred, logic dictates that the evidence does not warrant instructions on any lesser included offenses. We note that the supreme court used Marcum's rationale in State v. Gregory Robinson, ___ S.W.3d ___, No. W2001-01299-SC-R11-DD, Shelby County (Tenn. Sept, 28, 2004), reversing this court and holding that the trial court did not err by failing to charge facilitation to commit premeditated murder or facilitation to commit especially aggravated kidnapping because no reasonable juror could have concluded from the evidence that the defendant had the knowledge required for facilitation but lacked the intent required to commit the crimes. Nevertheless, despite our inability to reconcile the supreme court's analyses in Allen and Marcum, we believe that Allen directs us to determine whether any evidence exists to support the lesser included offenses of aggravated sexual battery, child abuse, and Class B misdemeanor assault. We conclude that the evidence does support those offenses. Therefore, the trial court erred by failing to instruct the jury on those lesser included offenses, and we turn to harmless error analysis.

In State v. Richmond, 90 S.W.3d 648, 662 (Tenn. 2002), our supreme court stated that "in deciding whether it was harmless beyond a reasonable doubt not to charge a lesser-included offense, the reviewing court must determine whether a reasonable jury would have convicted the defendant of the lesser-included offense instead of the charged offense." We question whether the standard announced in Richmond equates to a constitutional harmless error standard of beyond a reasonable doubt. In any event, in light of the standard announced in Richmond, we must conclude that, given the victim's testimony that the defendant had sexual intercourse with her, Mr. Young's testimony that the defendant came to the door on September 12 in his underwear and lied about the victim's whereabouts, and Dr. Drake's testimony that the victim's hymen had been torn but healed, no reasonable jury would have convicted the defendant of any lesser included offenses. Thus, the trial court's failure to instruct the jury on the lesser included offenses of child rape was harmless error.

B. Aggravated Sexual Battery

The defendant claims that the trial court should have instructed the jury on sexual battery and Class B misdemeanor assault as lesser included offenses of aggravated sexual battery. Aggravated sexual battery as charged in the indictment in this case is unlawful sexual contact with a victim when the victim is less than thirteen years old. See T.C.A. § 39-13-504(a)(4). Sexual battery, however, is defined as unlawful sexual contact with a victim when (1) force or coercion is used to accomplish the act, (2) accomplished without the consent of the victim, (3) the defendant knows the victim is mentally defective, or (4) accomplished by fraud. See T.C.A. § 39-13-505(a)(1)-(4). Because aggravated sexual battery as charged in the indictment does not require any of the four circumstances of sexual battery, sexual battery is not a lesser included offense of aggravated sexual battery under Burns, part (a). See State v. Randall Vertis Grainger, No. M2001-02178-CCA-R3-CD, Williamson County, slip op. at 6 (Tenn. Crim. App. Oct. 22, 2002), app. denied (Tenn. Mar. 3, 2003). Sexual

battery also is not a lesser included offense of aggravated sexual battery in this case under Burns, part (b). Id., slip op. at 6-7.

Class B misdemeanor assault is intentional or knowing physical contact with another person, and a reasonable person would regard the contact as extremely offensive or provocative. See T.C.A. § 39-13-101(a)(3). The supreme court has held that this theory of Class B misdemeanor assault is a lesser included offense of aggravated sexual battery of a child less than thirteen under the Burns test, part (b)(2). See State v. Swindle, 30 S.W.3d 289, 292-93 (Tenn. 2000). We must now determine whether the facts of this case warranted an instruction on Class B misdemeanor assault.

The victim testified that during the bathroom incident, she and the defendant ended up on the floor and the defendant was touching her breasts and genital area. She also testified that during the living room incident, the defendant was rubbing her private parts. Because both incidents involved contact that a reasonable person would regard as extremely offensive or provocative, we hold that an instruction on Class B misdemeanor assault as a lesser included offense of aggravated sexual battery was warranted.

Turning now to harmless error analysis, we note that the victim's testimony regarding the defendant's touching her private parts in the bathroom and living room was brief. She did not testify as to how long the touchings lasted or whether the defendant made any comments to her during the touchings. Nevertheless, the touchings were followed by sexual penetration. Moreover, the defendant told the victim after sexually penetrating her in the bathroom that she would feel better and would "want it more often." In light of these facts, and in keeping with the harmless error standard in Richmond, we cannot say that the jury would have convicted the defendant of the lesser included offense of Class B misdemeanor assault as a lesser included offense of aggravated sexual battery. Therefore, the trial court's failure to instruct on the lesser included offense was harmless error.

V. MENS REA JURY INSTRUCTIONS

The defendant claims that the trial court erred by including the nature-of-conduct, result-of-conduct, and circumstances-surrounding-conduct definitions of "intentionally," "knowingly," and "recklessly" in its charge to the jury. He contends that child rape and aggravated sexual battery cannot be nature-of-conduct, result-of-conduct, and circumstances-surrounding-conduct offenses and that the incorrect instructions lessened the state's burden of proof. The state contends that the jury instructions were correct and that, in any event, any error was harmless. We hold that the trial court did not improperly instruct the jury.

"[The] defendant has a constitutional right to a correct and complete charge of the law." State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). The trial court must describe each element of an offense and define the element in connection with that offense. See State v. Cravens, 764 S.W.2d 754, 756 (Tenn. 1989). A charge is prejudicial error if it fails to "submit the legal issues or if it misleads the jury as to the applicable law." State v. Hodges, 944 S.W.2d 346, 352 (Tenn. 1997).

The four culpable mental states in Tennessee are intentional, knowing, reckless, and criminal negligence. See T.C.A. § 39-11-302. Often, the statute defining an offense will state the culpable mental state. State v. Page, 81 S.W.3d 781, 786 (Tenn. Crim. App. 2002). If it does not, then "intent, knowledge or recklessness suffices." T.C.A. § 39-11-301(c). "Each of these mental states is defined with reference to two or three of the following possible conduct elements: (1) nature of defendant's conduct, (2) circumstances surrounding the defendant's conduct, and (3) result of the defendant's conduct." Page, 81 S.W.3d at 787 (citing T.C.A. § 39-11-302).

In State v. Howard, 926 S.W.2d 579, 586 (Tenn. Crim. App. 1996), this court stated that "[w]hen an offense has different mens rea for separate elements, the trial court must set forth the mental state for each element clearly so that the jury can determine whether the state has met its burden of proof." Later, in Page, 81 S.W.3d at 787, this court noted that second degree murder is a result-of-conduct offense and held that a trial court errs if it includes the nature-of-conduct or nature-of-circumstances definitions of "knowingly" in its charge to the jury.

In Page, the defendant hit the victim in the back of the head with a baseball bat. At trial, the defendant admitted swinging the bat at the victim, but claimed that he swung the bat only to intimidate the victim and had not intended to hit him in the head. The jury convicted him of second degree murder. On appeal, the defendant claimed that the jury instructions lessened the state's burden of proof. Noting that the state argued the wrong definition of "knowing" to the jury, this court agreed, holding that second degree murder is only a result-of-conduct offense and that the full "knowing" instruction could have resulted in the jury's finding the defendant guilty based on an awareness of the nature of the conduct or circumstances surrounding the conduct rather than the defendant's having an awareness that his conduct was reasonably certain to cause the victim's death. Id. at 788. This court remanded the case for a new trial, instructing the trial court to inform the jury only that the knowing mens rea of second degree murder required that the defendant acted with an awareness that his actions were reasonably certain to cause the victim's death. Id. at 790. Citing Page, the defendant contends that each mens rea definition should have included only the applicable conduct element(s) for each offense.

In the present case, the trial court instructed the jury that in order for it to find the defendant guilty of rape of a child, the jury had to find that the defendant, in pertinent part, sexually penetrated the victim, that the victim was less than thirteen, and that the defendant acted intentionally, knowingly, or recklessly. For aggravated sexual battery, the trial court informed the jury that it had to find that the defendant had unlawful sexual contact with the victim, that the victim was less than thirteen, and that the defendant acted intentionally, knowingly, or recklessly. Moreover, the trial court instructed the jury that the definition of "sexual contact" is "the intentional touching of the alleged victim's . . . intimate part . . . if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." Regarding the mens rea elements, the trial court stated the following:

> The word "intentionally" means that a person acts intentionally with respect [to] the nature of the conduct or to a result

> of the conduct when it is the person's conscious objective or desire to engage in such conduct or to cause such a result.
>
> The word "knowingly" under our law means that a person acts knowingly with respect to the conduct or circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist.
>
> A person acts knowingly with respect to a result of a person's conduct when the person is aware that the conduct is reasonably certain to cause that result.
>
> The word "recklessly" means that a person acts recklessly with respect to the circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards a substantial and unjustifiable risk that the circumstances exist or that the result would occur.
>
> The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all of the circumstances as viewed from the accused person's standpoint.

The defendant's brief only claims that child rape and aggravated sexual battery cannot be nature-of-conduct, result-of-conduct, and circumstances-surrounding-conduct offenses. He does not, though, state which conduct elements apply to each offense. The elements of rape of a child are unlawful sexual penetration of the victim and the victim's being less than thirteen. We believe that unlawful sexual penetration of the victim is both nature of the conduct and result of the conduct. See State v. Jennie Bain Ducker, No. 01C01-9704-CC-00143, Warren County, slip op. at 29 (Tenn. Crim. App. Mar. 25, 1999) (noting that nature of the conduct involves the physical act and that the result of the conduct is the harmful result), aff'd on other grounds 27 S.W.3d 889 (Tenn. 2000); see also State v. Vann, 976 S.W.2d 93, 106 (Tenn. 1998) (referring to sexual penetration as the "nature of the criminal conduct alleged"); State v. Michael D. Evans, No. 03C01-9703-CR-00104, Roane County, slip op. at 12-13 (Tenn. Crim. App. Dec. 9, 1997) (stating that "conduct which results in sexual penetration" must be proved intentionally, knowingly, or recklessly), aff'd on other grounds 108 S.W.3d 231 (Tenn. 2003). The victim's age is a circumstance surrounding the conduct. See State v. Deji A. Ogundiya, No. M2002-03099-CCA-R3-CD, Davidson County, slip op. at 6 (Tenn. Crim. App. Feb. 19, 2004) (noting that child rape "hinges on circumstances surrounding the defendant's conduct, namely the age of the victim"). The elements of aggravated sexual battery are sexual contact and the victim's being less than thirteen. The definition of "sexual contact" further requires an intentional touching of the victim's intimate parts and the touching can be reasonably construed as being for the purpose of sexual arousal or gratification. Like penetration, we believe that touching the victim's intimate parts is both a nature of the conduct and result of the conduct. The touching's being reasonably construed as for the purpose of sexual arousal or gratification and the victim's being less than thirteen are circumstances surrounding the conduct.

This case is significantly different from Page. First, rape of a child and aggravated sexual battery contain all three conduct elements. Moreover, with the exception of the intentional touching element in aggravated sexual battery, a jury can find the defendant guilty by determining that he acted intentionally, knowingly, or recklessly as to the other elements. The trial court in the present case instructed the jury that in order to find the defendant guilty of child rape or aggravated sexual battery, it had to determine that the defendant acted intentionally, knowingly, or recklessly. Regarding the "sexual contact" for aggravated sexual assault, the trial court's instruction specifically stated that it required the jury to find that the defendant touched the victim intentionally. Finally, unlike Page, the defendant in this case did not dispute his mens rea. See generally State v. Jarret A. Guy, No. M2002-02473-CCA-R3-CD, Davidson County, slip op. at 8 (Tenn. Crim. App. May 11, 2004) (noting that a trial court's error regarding the definition of a culpable mental state may be harmless beyond a reasonable doubt when the defendant does not dispute his mens rea at trial). We conclude that the instructions did not lessen the state's burden of proof.

We note that the defendant contends State v. Deji A. Ogundiya is similar to the present case and demonstrates that the trial court's instructions constitute reversible error. In Deji A. Ogundiya, the defendant was charged with three counts of sexual battery, which requires that a defendant have unlawful sexual contact with a victim and that the contact is without the victim's consent. See T.C.A. § 39-13-505(a)(2). The trial court instructed the jury that it had to find, in pertinent part, that the defendant (1) intentionally touched the victim's intimate parts, (2) that the sexual contact was without the victim's consent, and (3) that the defendant acted intentionally, knowingly, or recklessly. On appeal, the defendant claimed that the trial court erred by failing to charge Class B misdemeanor assault as a lesser included offense. This court agreed and reversed the defendant's convictions. Id., slip op. at 3. In a separate issue, the defendant also claimed that the trial court erred by instructing the jury that it could find him guilty by determining that he acted recklessly. This court noted that the trial court did not instruct the jury clearly as to the mens rea of each element and did not explain to the jury that the recklessness mens rea only applied to the victim's lack of consent. Id., slip op. at 7. It then stated that upon retrial, the trial court should instruct the jury carefully as to the mens rea for each element of the offense. Id. This court did not state, however, that the trial court's instructions constituted reversible error. Unlike Deji A. Ogundiya, the trial court's instructions in the present case did not constitute error, much less reversible error.

VI. EXCESSIVE SENTENCE

Finally, the defendant claims that his sentences are excessive because the trial court improperly applied enhancement factors in light of Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531 (2004), and failed to apply a mitigating factor. The state claims that the defendant's sentences are not excessive and that the defendant has waived any issue regarding Blakely. We hold that the trial court improperly applied enhancement factors under Blakely and reduce the defendant's sentences accordingly.

At the sentencing hearing, Thomas Edward Rowland, III, the presentence officer, testified that he prepared the defendant's presentence report. He said that from April to September 1999, the

defendant worked for a lumber yard but was fired. He said that the defendant also was employed from December 1998 to March 1999 but that the defendant's employment history was poor and unstable. He said the defendant also had many prior convictions, including convictions in 1996 for vandalism and driving on a suspended license; a 1995 conviction for public intoxication; convictions in1994 for driving under the influence (DUI) and driving on a suspended license; a 1993 conviction for driving on a suspended license; 1992 convictions for resisting arrest and driving on a suspended license; a 1991 DUI conviction; and convictions in 1990 for vandalism and public intoxication. He acknowledged that all of the defendant's prior convictions were for misdemeanor offenses and that the defendant had never been convicted of a sex crime. He said that the defendant dropped out of school in the seventh grade, that the defendant admitted using alcohol since he was twelve and marijuana since he was fifteen, and that the defendant reported using methamphetamine weekly since 1999.

Patricia Young, the victim's stepmother, testified that she had a close relationship with the victim and that the victim confided in her. She said the victim told her that the victim had nightmares every night and that the victim would wake up and see the defendant standing over her. She said that the victim felt comfortable talking to her about the abuse and that the victim did not want to see a counselor. She said that the defendant's sexually abusing the victim had affected the victim a little, that going through the trial process had helped the victim, and that the victim wanted to put the abuse behind her. On cross-examination, Ms. Young testified that the victim did not date boys and no longer talked about Aaron Trobaugh. She said that the victim used to love Mr. Trobaugh as a friend but that the victim no longer liked him. She said that the victim was happy and cheerful everyday and that she had never been awakened by the victim's nightmares.

The defendant testified that he grew up in Louisville, Kentucky and that his father died before he was born. He said that his mother remarried and that he had a good relationship with his stepfather. He said that he dropped out of school in the seventh grade because he fell behind and could not catch up and that he had been using alcohol occasionally at that time. He said that he and the victim's mother were in a relationship for about seven years, that he got along great with her children, and that he helped her take care of them. He said that he would never hurt a child and that he did not commit the crimes against the victim.

On cross-examination, the defendant testified that if the victim had sex with anyone, it must have been Aaron Trobaugh. He said that the victim did not accuse him of the crimes in this case until people found out about the letters she had written to Mr. Trobaugh and that she accused him in order to protect Mr. Trobaugh. He acknowledged that the victim trusted him and said that the victim and her father lied about the defendant's going to the trailer door in his underwear. He said that the victim's father got custody of the children because the victim's father no longer wanted to pay child support and that the jury only heard one side of the story. Upon questioning by the trial court, the defendant testified that he had experimented with drugs and alcohol but that he had not used them steadily and did not have a drug or alcohol problem.

Thelma Jean Brown, the defendant's mother, testified that she and the defendant's father were in a car accident while she was pregnant with the defendant and that the defendant's father was killed. She said that as a result of the accident, the defendant was a slow learner when he was young. She said that he was not violent and was kind to the victim and the victim's brother and sister. She said the defendant would fix their meals and snacks, buy them shoes and clothes, and take them to the store. She said that the children acted like they loved the defendant, that she never saw him lay a hand on them, and that the victim did not seem to be afraid or sad when the victim was around the defendant. On cross-examination, Ms. Brown acknowledged that the defendant had had many run-ins with the law.

According to the defendant's presentence report, the then thirty-two-year-old defendant was divorced and had a young son. In the report, the defendant stated that he received treatment for seven days at Moccasin Bend Mental Health in 1999 for depression. He also stated that in addition to working for a lumber yard, he worked for Fiber Cell in Cookeville for one month in 1999 and did farm work for various people. However, the investigating officer was unable to verify the defendant's employment claims. The report confirms that the defendant was convicted of twelve misdemeanors from 1990 to 1996.

The trial court applied enhancement factors (2), that the defendant "has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;" (9), that the defendant "has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community"; and (16), that the defendant abused a position of private trust, to all of his convictions. See T.C.A. § 40-35-114(2), (9), (16). The trial court also applied factor (8), that the "offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement," to the defendant's child rape convictions. See T.C.A. § 40-35-114(8). The trial court gave great weight to enhancement factors (2), (8), and (16) and gave some weight to factor (9). The trial court applied no mitigating factors and increased the defendant's sentences for child rape from the presumptive twenty years to twenty-five years and his sentences for aggravated sexual battery from the presumptive eight years to twelve years, to be served concurrently.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing

principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

The range of punishment for a Range I defendant is fifteen to twenty-five years for a Class A felony and eight to twelve years for a Class B felony. T.C.A. § 40-35-112(a)(1), (2). Unless there are enhancement factors present, the presumptive sentence to be imposed is the midpoint in the range for a Class A felony and the minimum in the range for a Class B felony. T.C.A. § 40-35-210(c). Our sentencing act provides that procedurally, the trial court is to increase the sentence within the range based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169.

Recently, the United States Supreme Court has called into question the portion of our 1989 Sentencing Act that allows judges to find applicable certain enhancement factors and use those factors to increase a defendant's sentence above the presumptive sentence in the range. In Blakely, the defendant was convicted of second degree kidnapping with a firearm, a Class B felony, against his estranged wife. According to Washington's Sentencing Reform Act, the maximum sentence for a Class B felony was ten years but the range of sentencing for second degree kidnapping with a firearm was forty-nine to fifty-three months. When sentencing the defendant, the trial court determined that the defendant had acted with "deliberate cruelty," an "aggravating factor" listed in the Act, and increased the sentence to ninety months in confinement, thirty-seven months above the maximum in the range for the offense.

The defendant appealed, claiming that the trial court's using the deliberate cruelty factor to enhance his sentence violated his right under the United States Constitution to have a jury determine

"beyond a reasonable doubt all facts legally essential to his sentence." Blakely, 542 U.S. at ___, 124 S. Ct. at 2536. The Supreme Court agreed, noting that in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), it held that facts which increase a sentence beyond the statutory maximum, other than facts of a prior conviction, must be determined by a jury beyond a reasonable doubt. Blakely, 542 U.S. at ___, 124 S. Ct. at 2537. Although the state had argued that the defendant's ninety-month sentence was not unconstitutional because the Act allowed for a sentence of up to one hundred twenty months for a Class B felony, the Supreme Court rejected this argument, stating,

> Our precedents make clear, however, that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

Id. (citations omitted).

Our sentencing scheme under the 1989 Act is similar to Washington's Sentencing Act, prescribing particular ranges of punishment, depending upon the class of the felony and the defendant's sentencing range. For example, in this case, the trial court sentenced the defendant as a Range I offender for which the range of punishment for a Class A felony is fifteen to twenty-five years and for a Class B felony is eight to twelve years. Pursuant to T.C.A. § 40-35-210(c), the presumptive sentence for a Class A felony is the midpoint in the range, twenty years, and the presumptive sentence for a Class B felony is the minimum in the range, eight years. The only way the trial court can deviate from the presumptions is to find the existence of enhancement factors as listed in T.C.A. § 40-35-114. According to Blakely, the "prescribed statutory maximum" equates to the presumptive sentence, not the maximum sentence in the range. Thus, Blakely specifies that other than prior convictions, any facts not reflected in the jury's verdict and used to increase a defendant's punishment above the presumptive sentence must be found by the jury, not the trial court.

A. Waiver

Turning to the case before us, the state contends that the defendant has waived any Blakely issue because he failed to raise it in the trial court. The United States Supreme Court has stated that "[w]hen a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." Schriro v. Summerlin, ___ U.S. ___, ___, 124 S. Ct. 2519, 2522 (2004). The state argues that Blakely does not establish a new rule but merely clarifies the rule announced in Apprendi. In support of its argument, the state notes that the Supreme Court stated in Blakely that

"[t]his case requires us to apply the rule we expressed in Apprendi." Blakely, 542 U.S. at ___, 124 S. Ct. at 2536.

A case "'announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government.'" Van Tran v. State, 66 S.W.3d 790, 810-11 (Tenn. 2001) (quoting Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070 (1989)). "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301, 109 S. Ct. at 1070.

In Apprendi, the defendant was convicted of many offenses, including second degree possession of a firearm for an unlawful purpose, for shooting into an African-American family's home. Although state law prescribed a sentence of five to ten years for a second degree offense, a New Jersey hate crime statute provided that a judge could enhance the defendant's sentence above the maximum in the range if the crime was racially motivated. Pursuant to the statute, the trial court sentenced the defendant to twelve years in confinement. The Supreme Court reversed, holding that, other than the fact of a prior conviction, the Constitution requires the jury to find beyond a reasonable doubt any fact that increases the penalty for a crime beyond the "prescribed statutory maximum." 530 U.S. at 490, 120 S. Ct. at 2362-63.

The state contends that Blakely merely extends the rule announced in Apprendi. However, in Graham v. State, 90 S.W.3d 687, 692 (Tenn. 2002), our supreme court held that the noncapital sentencing procedure in this state complied with Apprendi, saying,

> In Apprendi, the United States Supreme Court reviewed a New Jersey provision that allowed a judge to impose a sentence exceeding the statutory maximum for an offense if the judge finds, by a preponderance of the evidence, that the offense constituted a hate crime. The [Tennessee] Supreme Court struck the provision down, holding that due process requires that "any fact, other than a previous conviction, used to enhance a sentence above the statutory maximum must be: (1) charged in the indictment, (2) submitted to the jury, and (3) proven beyond a reasonable doubt." State v. Dellinger, 79 S.W.3d 458, 466 (Tenn. 2002) (quoting Apprendi, 530 U.S. at 476, 120 S. Ct. 2348). However, the Court emphasized that the judge still retains his discretion to consider all enhancing and mitigating factors "within the range prescribed by the statute." Apprendi, 530 U.S. at 481, 120 S. Ct. 2348 (emphasis added).
>
> The petitioner in this case received a sentence within the statutory maximum for each crime. Accordingly, the trial court was well within its constitutional and statutory authority to consider enhancing factors for the purpose of sentencing without the assistance of the jury. Thus, Apprendi provides the petitioner with no relief.

We acknowledge that Blakely extended Apprendi's holding that, under the Sixth Amendment, a jury must find all facts used to increase a defendant's sentence beyond the statutory maximum. However, nothing in Apprendi suggested that the phrase "statutory maximum" equated to anything other than the maximum in the range. To the contrary, the United States Supreme Court stated the issue in Apprendi as "whether the 12-year sentence imposed . . . was permissible, given that it was above the 10-year maximum for the offense charged in that count." 530 U.S. at 474, 120 S. Ct. at 2354. We also note that the Supreme Court has considered the retroactive effect of the holding in Ring v. Arizona, 536 U.S. 584, 592-93, 122 S. Ct. 2428, 2435 n.1 (2002), as a new rule for capital cases even though it was based on Apprendi. See Schriro, ___ U.S. at ___, 124 S. Ct. at 2526-27. Perhaps this resulted from the fact that Ring overruled a case that had held the opposite. See Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047 (1990). In this regard, with our own supreme court expressly approving our sentencing procedure under Apprendi, we have a difficult time faulting a defendant in Tennessee for not raising the issue before Blakely. We conclude that Blakely alters Tennessee courts' interpretation of the phrase "statutory maximum" and establishes a new rule in this state. The defendant's raising the issue while his direct appeal was still pending is proper.

In any event, even if Blakely did not establish a new rule, the United States Supreme Court in Apprendi stated that the defendant's right to have a jury find facts that increase his sentence above the prescribed statutory maximum is rooted in his Fourteenth Amendment right to due process and his Sixth Amendment right to a jury trial. 530 U.S. at 476, 120 S. Ct. at 2355. In State v. Ellis, 953 S.W.2d 216, 220 (Tenn. Crim. App. 1997), this court held that although there was no common law right to waive a jury trial, Rule 23, Tenn. R. Crim. P., allowed a defendant to "waive a jury trial if the waiver is in writing and is knowingly executed." Absent a written waiver, "it must appear from the record that the defendant personally gave express consent [to waive a jury trial] in open court." Ellis, 953 S.W.2d at 221. Blakely, as an extension of Apprendi, also requires proof in the record that the defendant personally waived that right.

B. Application of Blakely

The trial court applied enhancement factor (2) based on the fact that the defendant had many prior convictions. The majority of this court concludes that, under Blakely, the trial court may use the defendant's admission of prior illegal drug use to enhance his sentences based on his previous history of criminal behavior.

The majority believes that Blakely allows the defendant's admissions at a sentencing hearing to be used for enhancement purposes. Thus, because the defendant admitted prior drug use in his testimony, the majority concludes that no error existed in applying factor (2) relative to criminal history. See State v. Steven M. Stinson, No. E2003-01720-CCA-R3-CD, Campbell County (Tenn. Crim. App. July 29, 2004); State v. Antonio Fuller, No. M2002-02377-CCA-R3-CD, Davidson County, slip op. at 14-15 n.2 (Tenn. Crim. App. July 13, 2004), app. filed (Tenn. Sept. 2, 2004); see also United States v. Ameline, 2004 U.S. App. LEXIS at *37 (9th Cir. Mont. July 21, 2004) (stating that a jury should make the factual findings except when the defendant admits facts as part of a guilty plea or at sentencing or waives the right to a jury).

However, the author of this opinion believes that Blakely prohibits such a judicial determination. Blakely provides that the "statutory maximum" is the maximum sentence a judge may impose based on facts reflected in the jury's verdict or "admitted by the defendant." However, Blakely, relying on Apprendi, goes on to state that "nothing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." Blakely, 542 U.S. at ___, 124 S. Ct at 2541. A "stipulation" means a "material condition or requirement in an agreement" or a "voluntary agreement between opposing parties concerning some relevant point," which has a much stronger connotation than an "admission." Blacks Law Dictionary 1146 (7th ed. 2000). Moreover, in discussing a defendant's admissions in Apprendi, the Supreme Court relied on Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219 (1998), a case in which the defendant admitted prior felony convictions during his guilty plea hearing. Apprendi, 530 U.S. at 487-88, 120 S. Ct. at 2361.

A guilty plea hearing, in which a defendant specifically waived his right to a jury and stipulated to facts in an agreement with the state or during a plea colloquy with the trial court, is a far cry from a sentencing hearing in which a judge alone makes the factual determinations. Just as it is a jury's prerogative to believe or disbelieve a defendant's testimony at trial, it also would be a jury's prerogative to believe or disbelieve a defendant's testimony at a sentencing hearing or the statements he provides for a presentence report. Therefore, the author concludes that the phrase "admitted by the defendant" refers to facts admitted by the defendant in relation to a guilty plea or during a plea colloquy. See also United States v. Mueffleman, 2004 U.S. Dist. LEXIS 14114, at *12 (Mass. Dist. Ct. July 26, 2004) (stating that Blakely requires that facts must be found by a jury "or admitted by the defendant in a plea agreement or plea colloquy"); United States v. Marrero, 2004 U.S. Dist. LEXIS 13593, at *7 (S.D.N.Y. July 21, 2004) (stating that facts must be "admitted or stipulated by the defendant, as in his plea allocution or in an agreement with the Government").

The majority relies on Steven M. Stinson and Antonio Fuller in support of its position. In Steven M. Stinson, a jury convicted the defendant of three counts of rape of a child, and the trial court applied several enhancement factors, including factor (16), that the defendant abused a position of private trust. On appeal, this court upheld the trial court's application of enhancement factor (16) despite Blakely, noting that the defendant conceded on appeal that the factor applied and did not contest the trial court's application of that factor. Such a formal concession through counsel did not occur in the case before us. Although on the panel that decided Steven M. Stinson, the author is now of the opinion that an "admission" under Blakely equates to an admission in a guilty plea hearing or a stipulation. In Antonio Fuller, a case in which a jury convicted two codefendant's of multiple offenses, this court held that the trial court properly applied enhancement factor (14) based on the defendants admitting that they were on bail or parole when they committed the offenses. However, the analysis in that case states only that the defendants admitted to the enhancement factors and does not reveal the circumstances surrounding those "admissions."

Regarding factor (9), that the defendant "has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community," the trial court applied the

factor because the defendant continued committing crimes and "totally [ignored] being placed back in the community." We hold that Blakely prohibits application of this factor because the trial court found the factor by a preponderance of the evidence and Blakely requires that a jury determine the fact proved beyond a reasonable doubt. Similarly, the trial court could not apply factor (16), that the defendant abused a position of private trust.

However, we believe the trial court properly applied factor (8), that the crimes involved a victim and were committed in order to satisfy the defendant's desire for pleasure and excitement. In finding the defendant guilty of aggravated sexual battery, the jury concluded that the defendant had sexual contact with the victim, which is defined as an intentional touching that can be reasonably construed as being for the purpose of sexual arousal or gratification. See T.C.A. § 39-13-501(6). In State v. Kissinger, 922 S.W.2d 482, 489-90 (Tenn. 1996), our supreme court held that an offense requiring sexual contact "necessarily includes the intent to gratify a desire for pleasure or excitement." Thus, the jury in this case found that the crimes involved the defendant's intent to gratify a desire for pleasure or excitement, and the trial court's application of this factor did not violate Blakely. In summary, the trial court properly applied enhancement factor (2) based on the defendant's prior convictions and, for the majority of the court, his prior drug use, and factor (8) but improperly applied factors (9) and (16).

C. Harmless Error

We next consider whether harmless error applies to constitutional violations under Blakely. Regarding constitutional harmless error analysis, the Supreme Court has stated that a trial court's finding of facts necessary to increase a defendant's sentence are essentially elements of a greater offense. Ring, supra, 536 U.S. at 609, 122 S. Ct. at 2443. It has also held that a jury's failure to find an element of an offense is subject to harmless error review. Neder v. United States, 527 U.S. 1, 8-14, 119 S. Ct. 1827, 1833-36 (1999). We therefore hold that any issues raised on appeal arising out of Blakely are subject to constitutional harmless error analysis.

We begin our analysis with Neder, in which the Court held that a trial court's failure to instruct the jury on the element of materiality in a prosecution for perjury was subject to constitutional harmless error analysis. The Court first stated that "most constitutional errors can be harmless." 527 U.S. at 8, 119 S. Ct. at 1833 (quoting Arizona v. Fulminante, 499 U.S. 279, 309, 111 S. Ct. 1246 (1991)); see also United States v. Hasting, 461 U.S. 499, 509, 103 S. Ct. 1974, 1980 (1983) (stating that application of harmless error analysis is generally the rule, not the exception). The Court noted that it had "recognized a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.'" 527 U.S. at 7, 119 S. Ct. at 1833 (quoting Fulminante, 499 U.S. at 309, 111 S. Ct. 1246 (1991)). These "structural" errors, the Court held, "are so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome." Neder, 527 U.S. at 7, 119 S. Ct. at 1833. The Court noted a "very limited class of cases" requiring

automatic reversal, id. at 8, 119 S. Ct. at 1833[1], but held that "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Id. at 8-9, 119 S. Ct. at 1833. The Court also noted,

> We have often applied harmless-error analysis to cases involving improper instructions on a single element of the offense. In other cases, we have recognized that improperly omitting an element from the jury can "easily be analogized to improperly instructing the jury on an element of the offense, an error which is subject to harmless-error analysis."

Id. at 9-10, 119 S. Ct. at 1834 (emphasis added) (quoting Johnson v. United States, 520 U.S. 461, 469, 117 S. Ct. 1544, 1550 (1997)). While Neder stands for the proposition that the omission of a finding of an element by a jury is subject to harmless error analysis, Apprendi and Ring clarify the relationship between sentence enhancement factors and elements.

In Apprendi, the Court indicated that sentence enhancement factors are essentially elements of a greater offense. See Apprendi, 530 U.S. at 486-96, 120 S. Ct. at 2365-67. "Indeed, the fact that New Jersey, along with numerous other States, has also made precisely the same conduct the subject of an independent substantive offense makes it clear that the mere presence of this 'enhancement' in a sentencing statute does not define its character." Id. at 495-96, 120 S. Ct. at 2366. The Court then outlined a test for determining whether so-called "enhancement factors" are elements of a greater offense: "When a judge's finding . . . authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'" Id. at 495, 120 S. Ct. at 2365 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411 (1986)).

Similarly in Ring, applying Apprendi to judge findings of aggravating circumstances beyond a reasonable doubt in capital cases, the Court stated, "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' Apprendi, 530 U.S. at 494 n.19, 120 S. Ct. 2348, the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609, 122 S. Ct. at 2443; accord id. at 610, 122 S. Ct. at 2444 (Scalia, J., concurring) (reaffirming "that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives–whether the statute calls them elements of the offense, sentencing factors, or Mary Jane–must be found by the jury beyond a reasonable doubt"); see also Blakely, 542 U.S. at __, 124 S. Ct. at 2531 ("The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish."). In conclusion, the Court

---

[1] See, e.g., Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617 (1986) (racial discrimination in selection of grand jury); Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 944 (1984) (denial of public trial); Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437 (1973) (biased trial judge); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963) (complete denial of counsel).

in Ring did "not reach the State's assertion that any error was harmless" under Neder because it "ordinarily leaves to lower courts to pass on the harmlessness of error in the first instance.[2]" Ring, 536 U.S. at 609 n.7, 122 S. Ct. at 2443 n.7.

We note that not every court considering harmless error in the Blakely context has come to the same conclusion as we do today. For example, before the Supreme Court decided Blakely, the Kansas Supreme Court held that Kansas' sentencing scheme violated the rule announced in Apprendi, but it declined the state's invitation "to apply principles of harmless error." State v. Gould, 23 P.3d 801, 814 (Kan. 2001). In declining to apply a constitutional harmless error standard, the court stated

> Apprendi . . . requires "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. 2348. Any other procedure "is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." 530 U.S. at 497, 120. S. Ct. 2348. Gould's sentence was imposed pursuant to an unconstitutional sentencing scheme and cannot stand.

Gould, 23 P.3d at 814. We believe, though, that the United States constitutional analysis by the Supreme Court controls our decision.

Our view of Neder, Apprendi, Ring and Blakely, considered together and in context, leads us to hold that constitutional harmless error analysis applies to any case asserting a violation of Blakely. While it is true that Blakely concerns the inviolate right to a jury trial, the cornerstone upon which our criminal justice system was constructed, we cannot say that a jury's failure to determine an enhancement factor "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Neder, 527 U.S. at 9, 119 S. Ct. at 1833. We will therefore review the Blakely errors to determine whether they were harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967).

---

[2]On remand, the Arizona Supreme Court applied the rule in Neder and held that the failure of the jury to find the aggravating factor did not constitute structural error requiring automatic reversal. Instead, the court reviewed the finding of the aggravating circumstance by the trial court under harmless error analysis. State v. Ring, 65 P.3d 915, 933 (Ariz. 2003), and opinion supplemented by State v. Ring, 76 P.3d 421, 423 (Ariz. 2003) (holding the trial court's application of aggravating circumstance, that the defendant committed the murder for pecuniary gain, was not harmless beyond a reasonable doubt notwithstanding the fact that "the evidence that Ring committed th[e] murder for pecuniary gain [wa]s strong").

If this author reviewed the defendant's admissions concerning prior use of drugs, it would be significant that the defendant testified at the sentencing hearing and admitted to using illegal drugs. No other evidence was introduced either disputing or contesting this fact. The author would conclude that applying factor (2) based on the defendant's prior criminal behavior in violation of Blakely would be harmless beyond a reasonable doubt.

The next Blakely error was the trial court's application of factor (9), that the defendant has a history of unwillingness to comply with conditions involving release into the community. In applying this factor, the trial court stated,

> The court in addition . . . does mention number [(9)] which has to do with the defendant has a previous history of unwillingness to comply with conditions of release into the community. And I looked at this and gave it some weight because of the number of times that he's been convicted of misdemeanors, placed on probation and put back in the community and just totally, it appears to me just totally ignored . . . being placed back in the community. So apparently the criminal justice system made no impression on this defendant.

In reviewing the trial court's application of factor (9), we note that the court does not mention that the defendant actually violated a term or condition of probation or alternative sentencing. The record also does not reflect that the defendant ever violated a term or condition of his misdemeanor sentences involving probation. Rather, it reflects that the defendant committed various misdemeanors during the decade preceding this crime. We cannot conclude that a reasonable jury would have found factor (9) applicable beyond a reasonable doubt. The trial court's application of this factor was not harmless.

At this point, though, we note that we have held that the presumption of correctness falls when the trial court's sentencing error is not harmless. State v. William L. Vaughn, No. M2002-01879-CCA-R3-CD, Davidson County, slip op. at 3 (Tenn. Crim. App. Aug. 1, 2003), app. denied (Tenn. Dec. 22, 2003) (citing State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997)). This means that we then review the defendant's sentence de novo with no presumption of correctness. State v. Winfield, 23 S.W.3d 279, 283 (Tenn. 2000). In this regard, we conclude that we cannot violate Blakely in our determination of appropriate enhancement factors.

We hold that only enhancement factors (2) and (8) can apply on de novo review without violating Blakely. We conclude, however, that the application of these factors does not warrant increasing the defendant's sentences to twenty-five years, the maximum within the range. Accordingly, we reduce the defendant's child rape sentences from twenty-five to twenty-three years.

Based on the foregoing and the record as a whole, we affirm the defendant's rape of a child convictions, but we hold that the aggravated sexual battery convictions violate double jeopardy and must be merged into his convictions for rape of a child. Therefore, the case is remanded for

modifying the judgments to reflect that the aggravated sexual battery conviction in count three is merged into the rape of a child conviction in count one and that the aggravated sexual battery conviction in count four is merged into the rape of a child conviction in count two. We also modify each of the defendant's sentences for rape of a child from twenty-five to twenty-three years.

_____

JOSEPH M. TIPTON, JUDGE